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MEMORANDUM FOR RON RIVELLI  
CHIEF, PARTNERSHIPS, TRUSTS AND INTERNATIONAL  
SECTION, S:CAS:B:P

FROM: W. Edward Williams  
Sr. Technical Reviewer  
CC:INTL:Br1

SUBJECT: Tax Treaty Exclusions for J-1 Visa Holders

This memorandum responds to your memorandum of September 5, 2002, requesting advice concerning the processing of returns claiming a J-1 tax treaty exclusion for exchange visitors from the Slovak Republic and the Czech Republic. You identified four issues that needed clarification. We requested the assistance of CC:PA:APJP:Br2 regarding your issue numbers 1, the second half of 2, 3 and 4, as those issues involve code sections under their jurisdiction. That office will respond to you directly regarding those issues. The following discussion addresses the first part of your issue number 2.

This memorandum does not relate to a specific case and is not binding on Examination or Appeals. This document is not to be used or cited as precedent. Do not disseminate this document beyond National Office personnel with a need to know.

**Issue**

Whether individuals participating in the Exchange Visitor Program under the Private Sector Programs Division in the Camp Counselor and Summer Work/Travel categories are eligible for benefits under Article 21 (Students, Trainees, Teachers and Researchers) of either the Income Tax Convention Between the United States and the Slovak Republic (the Slovak Treaty) or the Income Tax Convention Between the United States and the Czech Republic (the Czech Treaty).

**Conclusion**

Individuals participating in the Exchange Visitor Program under the Private Sector Programs Division in the Camp Counselor and Summer Work/Travel categories

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are not eligible for benefits under Article 21 (Students, Trainees, Teachers and Researchers) of either the Slovak Treaty or the Czech Treaty.

### **FACTS**

FMS identified an unusually high number of refund checks for delivery to non-resident aliens located in the Czech Republic and the Slovak Republic. A sample of the returns selected at random indicated that the taxpayers were citizens of either the Czech Republic or Slovak Republic. They were students who worked temporarily in the United States either as camp counselors or in a summer work/travel program, but who returned to their home country the same tax year. Forms 8233 indicate that the students were "Service Providers." The Forms IAP-66 indicate that the students participated in the Council on International Educational Exchange (CIEE) program. All individuals were J-1 visa holders.

### **Exchange Visitor Program**

The authority for the Exchange Visitor Program derives from the Mutual Educational and Cultural Exchange Act of 1961 (Public Law 87-256) as amended, 22 U.S.C. 2451, et. seq. (1988), also known as the Fulbright-Hays Act (or, as simply the Act). The purpose of the Act is to increase mutual understanding between the people of the United States and the people of other countries through educational and cultural exchanges. Activities specified in the Act are facilitated, in part, through the designation of public and private entities as sponsors of the Exchange Visitor Program.

Through this Exchange Visitor Program, foreign nationals may visit the United States temporarily to teach, lecture, study, observe, conduct research, consult, train, or demonstrate special skills. Designated sponsoring organizations facilitate the entry of the foreign nationals into the United States to complete the objectives of any one of the 13 program categories. At the conclusion of their program, participants are expected to return to their home countries.

There are two divisions in the program. The Academic and Government Programs Division includes the student program category. The Private Sector Programs Division includes the Alien Physician, Au Pair, Camp Counselor, Summer Work/Travel, and Trainee and Flight Training exchange visitor categories. Your request for advice concerns individuals that participate in the camp counselor and summer work/travel categories in this division.

Individuals participating in the Camp Counselor category interact directly with groups of American youth by overseeing their activities in a camp setting during the

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U.S. summer season.<sup>1</sup> Non-counseling chores may be an occasional part of camp life; however, program participants do not serve as “staff” –including (but not limited to) administrative personnel, cooks, or menial laborers such as dishwashers or janitors. Foreign university students, youth workers, and other specifically qualified individuals at least 18 years of age and proficient in English may work as counselors in U.S. summer camps for up to four months. Extensions are not permitted.

Through the Summer Work/Travel category foreign post secondary students may enter the United States to work and travel for a maximum of four months during their summer vacations.<sup>2</sup> Regulations prohibit the placement of program participants as domestic help in U.S. households or in positions requiring them to invest their own money for inventory, such as door-to-door sales. Most participants typically work in non-skilled service positions at resorts, hotels, restaurants, and amusement parks. Summer internships in U.S. businesses and other organizations (i.e., architecture, science research, graphic art/publishing and other media communication, advertising, computer software and electronics, and legal offices, etc.) are allowed. However, the term of the internship may not exceed four months.

Participants receive pay and benefits commensurate with those offered to their U.S. counterparts. Sponsors help to place the individuals in the camp counselor program at facilities approved by the sponsor and must provide information on the duties, responsibilities and contractual obligations relative to accepting a camp counselor position to their participants prior to their departure from the home country. Sponsors are responsible for placing a certain percentage of the work/travel students in positions and keeping track of them, and for facilitating job placement for the others if the student cannot find work within a week. The Council on International Educational Exchange (CIEE) is currently a designated sponsor organization to administer both the Camp Counselor and the Summer Work/Travel Exchange Visitor Programs.

### **Law and Analysis**

Section 861(a)(3) of the Internal Revenue Code (the “Code”) provides in general, with an exception not herein applicable, that compensation for labor or personal services performed in the United States shall be treated as income from sources within the United States.<sup>3</sup> Treasury regulation §1.861-4 fleshes out the statute by providing, in part, as follows:

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<sup>1</sup> Regulations pertaining specifically to the Camp Counselor category are found at 22 CFR 62.30.

<sup>2</sup> Regulations pertaining specifically to the Summer Work/Travel category are found at 22 CFR 62.32.

<sup>3</sup> All section references are to the Internal Revenue Code of 1986 as amended.

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Gross income from sources within the United States includes compensation for labor or services performed in the United States irrespective of the residence of the payer, the place in which the contract for service was made, or the place and time of payment...

As a general rule then, the gross income of a nonresident alien individual includes gross income derived from the performance of personal services within the United States. Sections 872(a)(2), 864(b), 864(c)(3) and 861(a)(3).

The U.S. source income of a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (J) of section 101(a)(5) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)((15)(J)) is treated as effectively connected with the conduct of a trade or business in the United States. Section 861(c). Such an individual includes a nonresident alien individual admitted to the United States as an "exchange visitor" under section 201 of the United States Information and Education Exchange Act of 1948 (22 U.S.C.) 1446), which was repealed by section 111 of the Mutual Education and Cultural Exchange Act of 1961 (75 Stat. 538). Treas. Reg. §1.871-9(c). The authority for the current Exchange Visitor Program is also the Mutual Education and Cultural Exchange Act of 1961.

Section 894(a)(1) of the Code provides that the provisions of this title shall be applied with due regard to any treaty obligation of the United States. Therefore, the general rule that gross income of a nonresident alien individual includes gross income from the performance of personal services within the United States is subject to any exceptions arising out of any treaty obligation of the United States.

In both the Czech Treaty and the Slovak Treaty, Article 15 (Dependent Personal Services) deals with the taxation of remuneration derived by a resident of a Contracting State for the performance of services in the other Contracting State as an employee. In general, both the State in which the individual is a resident and the State in which the services were performed may tax the remuneration unless certain exceptions apply. If the more specific rules of Article 21 (Students, Trainees, Teachers and Researchers) apply, however, those rules are used to determine the right of a Contracting State to tax the remuneration instead.

In both the Czech Treaty and the Slovak Treaty, Article 21 (Students, Trainees, Teachers and Researchers), paragraph 1, deals with certain payments received by a student who is temporarily present in the host State for the primary purpose of study at an accredited educational institution, securing professional training, or study or research as the recipient of a grant from a governmental, religious, charitable, scientific, literary or educational organization. If the student was a resident of the other State at the beginning of his visit, he will be exempt from tax in the host State on (i) payments (other than compensation for personal services) arising from sources, or remitted from, outside the host State, that are for the purposes of the student's or trainee's

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maintenance, education or training, (ii) the study or research grant, and (iii) income from personal services performed in the host State not exceeding \$5,000 or its equivalent in the currency of the other State.

The reference in paragraph 1 to “primary purpose” is meant to describe individuals participating in a full-time program of study, training, or research. It is not the intention to exclude full-time students, who, in accordance with their visas, may hold part-time employment jobs.<sup>4</sup> The individuals under the facts provided are not participating in a full-time program of study at an accredited educational institution, or of securing professional training, or study or research as the recipient of a grant from a governmental, religious, charitable, scientific, literary or educational organization. Therefore, the \$5,000 exclusion provided in Article 21, paragraph 1(b)(iii) for income from personal services performed in the host State does not apply to the individuals.

In both the Czech Treaty and the Slovak Treaty, Article 21, paragraph 3, deals with a resident of a Contracting State who is temporarily present in the other Contracting State for a period not exceeding one year, as a participant in a program *sponsored by the Government of the host State* for the *primary purpose* of *training*, research or study. Such an individual will be exempt from tax by the host State on compensation for personal services in respect to such training, research or study performed in the Host State in an aggregate amount not exceeding \$10,000 or its equivalent in Czech crowns or Slovak crowns, as the case may be. Thus, we must first determine whether the exchange visitor program category that these individuals are participating in is a program that is sponsored by the United States Government within the meaning of the Czech Treaty and the Slovak Treaty. If so, we must determine whether the primary purpose of their participation is for “training” as it is clearly not for research or study.

Article 3, paragraph 2 of both the Czech Treaty and the Slovak Treaty provides that any term not defined in the convention, unless the context otherwise requires, or the competent authorities agree to a common meaning pursuant to the provisions of Article 25 (Mutual Agreement Procedure), shall have the meaning which it has at the time under the law of that State for the purposes of the taxes to which the convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

Program sponsored by the government

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<sup>4</sup> Treasury Department Technical Explanation of the Convention and Protocol Between the United States of America and the Slovak Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Signed at Bratislava on October 8, 1993.

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The first United States income tax treaty to use the language of Article 21, paragraph 3 was the Income Tax Convention with the Republic of Honduras in 1956 (the Honduras Treaty). The Senate Finance Committee Report described the new feature in paragraph 3 of Article XIII of the Honduras Treaty as follows:

Skilled personnel of one of the contracting states, temporarily present in one of the other contracting states under the auspices of such other state, for the purpose of training, study, or orientation, are provided an exemption from tax by the other state on compensation not exceeding \$10,000. This latter provision is not contained in the other United States income tax treaties. It would apply, for example, to military trainees and trainees under technical assistance programs.

Substantially identical exemptions are found in twenty-four other United States tax treaties now or previously in effect.<sup>5</sup> To interpret the meaning of the terms in this paragraph as used in Article XIII(3) of the United States - Pakistan Income Tax Convention (the Pakistan Treaty), Rev. Rul. 72-301<sup>6</sup> examined Article XII, paragraph 2 of the United States - Sweden Income Tax Convention (the Swedish Treaty) with regard to individuals temporarily present in the other contracting state as students, trainees, or research workers under arrangements with the government of such other state.

Under that provision of the Swedish Treaty, persons temporarily present in the United States under arrangements with the United States or its agencies would not include those who may be in the United States under a general cultural exchange agreement between the United States and a foreign country, but would include those here under a specific program, sponsored or supported by the U.S. Government, such as, but not limited to, technical assistance trainees, military and armed forces trainees, and foreign central bank employees studying budgetary and financial policies.<sup>7</sup>

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<sup>5</sup> Germany 1954; Honduras 1956; India 1959; Egypt 1960; Israel 1960; Luxembourg 1962; Brazil, Art. 19(3), 1967; Cyprus, Art. 21(3), 1985; Czech Republic, Art 21(3), 1993; Egypt, Art 22(3), 1981; Estonia, Art 22(3), 1999; Iceland, Art. 22(3), 1975; Indonesia, Art. 19(3) (bus or tech apprentice), 1990; Israel, Art. 24(3), 1994; Japan, Art. 20(3), 1972; Korea, Art. 21(3), 1979; Latvia, Art. 20(3), 1999; Lithuania, Art. 20(3), 1999; Norway, Art. 16(3), 1972; Pakistan, Art. XIII(3), 1959; Philippines, Art. 22(3), 1982; Poland, Art. 18(3), 1976; Romania, Art. 20(3), 1976; Slovak Republic, Art. 20(3), 1993; Thailand, Art. 22(3), 1997; Trinidad and Tobago, Art.19(3), 1970.

<sup>6</sup> 1972-1 C.B. 439.

<sup>7</sup> The Statement of the Treasury Department with respect to Article XII(2) of the United States - Sweden Income Tax Convention, Senate Executive Report No. 10, 88<sup>th</sup> Cong., 1965-1 C.B. 633 at 676.

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Rev. Rul. 72-301 then examined Article XIV(3) of the United States -Luxembourg Convention (the Luxembourg Treaty)<sup>8</sup> which is also substantially similar to Article XIII(3) of the Pakistan and Honduras Treaties. The explanation of the Treasury Department with respect to Article XIV(3) provides that the training, research, or study carried on by the individual must be undertaken as a result of arrangements which he has entered into, or which have been made on his behalf, with the government of the other country.<sup>9</sup>

Rev. Rul. 72-301 therefore concludes that based on the comments by the Department of the Treasury on the Swedish Treaty and the Luxembourg Treaty, the phrase "under arrangements with such other state" contained in Article XIII(3) of the Pakistan Treaty is interpreted to mean that the exemption is provided to individuals who, under arrangements with the United States or an agency or instrumentality thereof, are invited to the United States for training or study under a specific program, sponsored or supported by the United States Government.

G.C.M. 34021 (1969) considered the facts underlying a proposed revenue ruling involving whether the individual was temporarily present in the United States under such a program. A resident of Pakistan was present in the United States on an exchange visa under the Mutual Educational Exchange Act of 1961 for the purpose of medical study and training.<sup>10</sup> The proposed ruling was based on the conclusion that an individual who enters the United States on an exchange visa under the Mutual Educational and Cultural Exchange Act of 1961 qualifies under Article XIII(3) of the Pakistan Convention as an individual who enters the country under arrangements with the United States or any agency or instrumentality thereof. The G.C.M. did not concur and interpreted that phrase in Article XIII(3) as being limited to an arrangement by which the alien is a participant in a particular government-sponsored program rather than merely as an exchange visitor under a general cultural exchange program.

The hearings and reports of the Senate Finance Committee regarding the Pakistan Treaty do not provide any information regarding the meaning of the language used in Article XIII(3), and the usual technical memorandum was not supplied to the Senate because the Minister of Finance of Pakistan was to testify before the Senate Finance Committee a few days after the treaty was submitted. Therefore, the G.C.M. looked to the file relating to the preparation of the draft of the convention. The Technical Memorandum that had been prepared explained section 3 of Article XIII as follows:

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<sup>8</sup> 1965-1 C.B. 615, 620.

<sup>9</sup> Senate Finance Committee Report No. 10, 88<sup>th</sup> Cong., 1965-1 C.B. 633, 652.

<sup>10</sup> Act of September 21, 1961, P.L. 87-256, 75 Stat. 527, 1961-2 C.B. 322.

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By section (3) the above [exemption] is extended on a more liberal scale [than in paragraph 1] to a government-sponsored trainee. Thus, a resident of Pakistan brought for study or training to the United States by the International Cooperation Administration or other Federal Agency would be exempt from United States tax on compensation not exceeding \$10,000 paid to him during his sojourn in this country. It is pertinent to mention that the International Cooperation Administration provides "leader" grants to foreign industrialists, bankers, journalists and professional men, and if the beneficiary is employed, the employer usually pays salary during the beneficiary's absence in the United States.

The G.C.M. drafters believed that the comments on the Swedish Treaty are applicable to the Pakistan Treaty in view of the similarity in language between the provisions of the two treaties. The memorandum in the file on the Pakistan Treaty supports the view expressed by the Treasury Department as to the meaning of this language. Consequently, the G.C.M. held that an alien who is merely an exchange visitor under the Mutual Educational and Cultural Exchange Act of 1961 would not qualify for the exemption granted by paragraph 3 of Article XIII of the Pakistan Treaty.

The G.C.M. interpretation of this paragraph has not been contradicted or expanded in any other guidance issued by the Service. Because the language of Article 21, paragraph 3 of the Czech and Slovak Treaties is identical to this paragraph of the Pakistan Treaty, the phrase "under arrangements with the other State" means that an individual who enters the United States on an exchange visa under the Mutual Educational and Cultural Exchange Act of 1961 does not qualify under this paragraph as an individual who enters the country under arrangements with the United States or any agency or instrumentality thereof. The phrase is being limited to arrangements by which the alien is a participant in a particular government-sponsored program rather than merely as an exchange visitor under a general cultural exchange program. The Czech and Slovak students have all entered the United States on a J-1 visa to participate in a program sponsored under the Mutual Educational and Cultural Exchange Act of 1961, as amended, as exchange visitors under a general cultural exchange program.

Accordingly, the camp counselor and the summer work/travel categories of the Private Sector Division of the Exchange Visitor Program do not qualify as a program sponsored by the Government of the host State for the primary purpose of training, research or study within the meaning of these provisions. Nonresident alien individuals participating in these programs are not eligible for benefits under Article 21, paragraph 3 of the Czech Treaty or the Slovak Treaty. It is, therefore, unnecessary to consider the meaning of the term "training" for purposes of the provisions.

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Please call the branch at (202) 622-3880 if you have any further questions.

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W. EDWARD WILLIAMS  
Sr. Technical Reviewer, Branch 1  
Office of the Associate Chief Counsel  
(International)